FUNDS FOR LEARNING
BRINGING TECHNOLOGY TO THE CLASSROOM

DOCKET FILE COPY ORIGINAL

RECEIVED
APR 1 8 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 18, 2001

Magalie Salas
Secretary
Federal Communications Commission
445 12th Street SW
Room TW-A325
Washington, DC 20554

RE: In the Matter of Request for Review of the Decision of the Universal Service Administrator by Houston Independent School District Under FCC Docket Nos. 97-21 and 96-45

Dear Ms. Salas:

Enclosed please find the original and four copies of the Request for Review of the Houston Independent School District in the above-referenced matter.

Sincerely,

Orin R. Heend

Attachments

Funds For Learning, LLC • www.fundsforlearning.com
2111 Wilson Boulevard, Suite 700 • Arlington, VA 22201 • Ph: 703.351.5070 • Fax: 703.351.6218
2709 Lancaster Court, Suite 1100 • Edmond, OK 73003 • Ph: 405.341.7003 • Fax: 405.971.7685

Before the
Federal Communications Commission
Washington, DC

RECEIVED

APR 1 8 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:	)	
	)	
Request for Review of the Decision of the Universal Service Administrator by	)	
	)	
Houston Independent School District	)	471 App. No. 203737
	)	FCC Order DA 00-2642
	)	
	)	CC Docket No. 96-45
Federal-State Joint Board on Universal Service	)	
	)	CC Docket No. 97-21
Changes to the Board of Directors of the National Exchange Carrier Association, Inc	)	

TO: The Commission
Chief, Common Carrier Bureau

REQUEST FOR REVIEW

Pursuant to Subpart I of Part 54 of the Commission's Rules, Houston Independent School District ("HISD"), by its representative, hereby seeks review of the Decision of the Universal Service Administrator dated March 19, 2001, denying funding in full for Funding Request Number ("FRN") 455725.

I. Issue

Whether the Schools and Libraries Division of the Universal Service Administrative Company ("SLD" or "Administrator") acted improperly and, therefore, outside the scope of its authority by rejecting an application for lack of available funds when it knew or reasonably should have known that funding likely would remain to support the application either fully or in part.

II. Statement of Material Facts and Summary of Argument

Administrative History. On January 15, 2000, during the window application period for the 2000-2001 Schools and Libraries Program Year ("Program Year Three"), HISD filed a Form 471 application, Number 203737. (Attachment A.) The application included two funding requests, one for PBX equipment to be installed at school sites throughout the district and another for similar equipment to be installed at administrative locations.

On June 16, 2000, the SLD issued a Funding Commitment Decision Letter to HISD in which it apparently had decided not to fund either of the district's requests. Because the cursory decision was difficult to understand, HISD filed a "letter of inquiry" on June 23, 2000, seeking further explanation. On July 18, 2000, to preserve its appeal rights, HISD filed a formal "letter of appeal" with the SLD. On July 20, 2000, the SLD rejected HISD's appeal on the ground that it was untimely filed. On Aug. 18, 2000, HISD appealed the SLD's decision to the Federal Communications Commission ("Commission"). On Nov. 24, 2000, the Commission ordered the SLD to review the original appeal after concluding that the HISD had filed its appeal on time.

On March 19, 2001, the SLD issued its decision on appeal, this time clearly rejecting both of HISD's funding requests. (*See* Attachment B). HISD does not dispute the SLD's conclusion with respect to one of those requests; with respect to the other, however, it hereby appeals. That request, FRN 455725, was for discounts on school-based PBX equipment.

The SLD's Rationale. Eligibility was not an issue in the SLD decision to refuse funding; nor was compliance with program rules. The single issue, according to the SLD, was funding. The application was denied, the SLD explained, "because there is insufficient funding for Funding Year Three to provide discounts for internal connections requests to applicants that are below the 82 percent shared discount level."[1]

[1] Letter from SLD to Daryl Ann Borel, HISD, dated March 19, 2001 (Administrator's Decision on Appeal).

The SLD's Error. As explained more fully below, the SLD's decision to cut off without exception *all* funding for Program Year Three funding requests for internal connections at the 82 percent discount level was purely arbitrary and directly contravened Commission policy regarding the commitment of funds. We submit that at the time the SLD decided not to fund HISD's request, the SLD either knew or should have known that sufficient Program Year Three funds were or would become available to support some, if not all, "window application" requests for internal connections at 81 percent, including HISD's.

The SLD, therefore, had no reasonable basis and certainly no authority to throw out HISD's request for E-rate support. This decision precluded any possibility of funding, even if tens or even hundreds of millions of dollars of Program Year Three funding ultimately went unspent. Instead and at the very least, the SLD should have held HISD's request in abeyance until it could determine exactly how much additional Program Year Three funding would be available.

Relief Requested. For a variety of reasons, we believe it can be demonstrated that the SLD now knows that it will have enough money available in Program Year Three to support HISD's funding request, and, therefore, we request that the Commission instruct the SLD to do so as quickly as possible. Alternatively, we request that the Commission instruct the SLD to reinstate the FRN and to hold it in abeyance until such time as it can determine conclusively or, at a minimum, with reasonable certainty that it either will or will not have funds available to support all or a part of HISD's request.

II. Discussion

Under the Commission's rules, the SLD's decision to reject HISD's funding request due to insufficient funding was premature and thus impermissible, as the SLD had yet to determine conclusively or even to a reasonable certainty that no Program Year Three funds remained to support it—even if only on a pro-rata basis.

The Commission has well-established and very specific rules to govern how the SLD must allocate discounts to applicants where, as here, total demand for support exceeds the amount of funds available and a filing window is in effect. *See Request for Review by Hamilton County School Board* File No. SLD-173624, Order, DA 01-873 (Common Carrier Bureau, rel. April 17, 2001). In its Decision On Appeal, the Administrator detailed most, but not all, of these rules[2]:

> Commission rules require that where demand for funding exceeds available support, first priority be given to requests for telecommunications services and Internet access. Commission rules further require that requests for internal connections be given second priority, and be funded only if funds remain after support has been provided for telecommunications and Internet access through all discount levels in a funding year. Where demand for discounts for internal connections exceeds available support, Commission rules require that funding be allocated to the most economically disadvantaged schools as determined by the matrix at 47 CFR 54.505 (c). Pursuant to the matrix, funds are allocated to applicants eligible for a 90 percent discount, then to schools eligible for an 80 percent discount, and in the same manner until no funds remain...[Because a school district's discount rate is determined by a weighted average of the discount rates of all the schools in the district, school districts' discount rates are usually single discount level percentages.]...Consequently, where demand for discounts for internal connections exceeds available support, funds are allocated first to applicants at the 90 percent discount level, and then at each descending single percentage *until there are no remaining funds*. (Emphasis added; citations omitted).

The one rule the Administrator failed to mention covers what the SLD is supposed to do when there is not enough funding to support all of the requests within a single discount percentage. In the *Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45*, the Commission answered this question, providing the following instructions to the SLD on how to make funding commitments, should it find itself in this situation:[3]

> We also clarify that, to the extent sufficient funds do not exist to fund all requests within a single discount percentage, the Administrator shall allocate the *remaining support* on a pro rata basis over that single discount percentage level, as provided in section 54.505(g)(1)(iv) of the Commission's rules. (Emphasis added).

[2] Ibid.

[3] *Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45 and Further Notice of Proposed Rulemaking*, released May 28, 1999 at Paragraph 6.

Under the Commission's rules, therefore, so long as in a single discount percentage band there are valid funding requests outstanding and universal service funding *remaining* to support them, even if only on a pro-rata basis, the SLD must allocate those funds. Thus, applicants at the 81 percent discount rate in Program Year Three, like HISD, that have filed timely applications in compliance with every program rule, that have answered every question posed to them by the SLD's Problem Resolution and Program Integrity Assurance staff, and that may have spent countless hours preparing responses to an Item 25 Audit, are legally entitled to Program Year Three funds – if Program Year Three funds remain, and we submit that they do. Simply because the SLD declares, without support, that "there are not sufficient funds to provide internal connections discounts to applicants at [the 81 percent] discount rate"[4] cannot make it so. Significantly, the history of the E-rate program to date supports the completely opposite conclusion.

In the first year of the program, for example, applicants failed to spend $448 million worth of the funding commitments that had been made for that funding year, even though the SLD had projected that no funds would remain for internal connections below the 70 percent discount band.[5] That example is telling for two reasons. First, it demonstrates the extreme fallibility of premature projections in these unchartered waters. Second, although the Commission used most of that money to reduce collections from carriers for the Universal Service Fund, there was still substantial funding available from Program Year One that theoretically could have provided additional support for Program Year Three requests.

Program Year Two should have taught the SLD a similar lesson. By September 30, 2000, the extended installation deadline for Program Year Two, it was clear that that same pattern of unspent commitments was persisting. By that date, Program Year Two applicants had claimed only $1,081.961 million of the approximately $1,925 million in

---

[4] Administrator's Decision on Appeal, March 19. 2001.

[5] Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections and Contributions Base for the First Quarter 2001, November 2, 2000, pp 27-28.

commitments that had been approved for them.[6] In a December 2000 report, the General Accounting Office acknowledged this situation with concern, reporting that as of August 31, 2000, two months after the close of the second funding year, at least $1.3 billion of the $3.7 billion in funds that had been committed in the first and second program years had not yet been disbursed.[7] In a letter responding to the report, the presidents of USAC and the SLD wrote that they "share GAO's concern" and that narrowing the gap between commitments and disbursements "will be a priority for us in the months ahead."[8]

By Program Year Three, we believe, the SLD became convinced that a substantial gap would always exist between inevitably inexact funding commitments on the one hand and universal service payments on the other. In fact, at the January 29, 2001 meeting of the Schools and Libraries Committee of the Universal Service Administrative Company's board of directors, the committee instructed USAC staff to discuss with Commission staff several options "to address the gap between commitments and disbursements." Among the options that were to be studied were "to commit funds at a level above the annual collections cap" and "make 'contingent' commitments."[9] This, we believe, amounted to a long overdue acknowledgement that the current commitment strategies are flawed as a measure of predicting ultimate demand on the program's financial resources. Relying on them, therefore, to project definitively for funding purposes the *specific* discount level below which funds will no longer remain makes no sense.

Indeed, the history of the E-rate program makes it plain that at least some funding for internal connections will remain for requests below 82 percent, possibly even enough to fund all of the requests at 81 percent. But even if there were not sufficient funds to support all of the requests for internal connections at 81 percent, under Commission rules the SLD is required to divide whatever funds remain on a pro-rata basis among all of the eligible applicants requesting support for internal connections at that level.

---

[6] Ibid, p. 25.
[7] General Accounting Office, "Schools and Libraries Program: Application and Invoice Review Procedures Need Strengthening," December, 2000, p. 14.
[8] Ibid., p. 65.
[9] See Schools & Libraries Committee Quarterly Minutes (Draft), January 29, 2001, at http://www.universalservice.org/board/minutes/sl/012901.asp (retrieved on April 16, 2001).

If the SLD cannot distribute all of the available funding because it must retain some funding for meritorious appeals, it should hold HISD's request in abeyance until such time as it knows with certainty the amount of funding that will remain.

For the E-rate program's third funding year, it was clear early on that there would be limited funding available for internal connections. In April 2000, the SLD informed the applicant community that it would not be able to support requests for discounts for internal connections from applicants with discount rates of 80 percent or lower. Over the next few months, as the SLD continued to review applications, the threshold was slowly lowered. Finally, on Nov. 22, 2000, the SLD announced on its website (*see* Attachment C) that it would not be able to support requests from applicants with discount rates below 82 percent.

We presume that the SLD established the threshold at the point it did to provide itself with additional funds (approximately $165 million) with which it could support appeals that turned out to be meritorious.[10] (The need to set aside money to cover the program's administrative costs should not be at issue because the program is earning more in interest on undisbursed funds than it is generating in expenses.) [11] Still,

[10] On Feb. 6, 2001, USAC reported in its quarterly report to the FCC (Federal Universal Support Mechanisms Fund Size Projections and Contributions Base for Second Quarter 2001) that through Dec. 30, 2000, it had committed a total of $2,084.902 million for Program Year Three funding requests. (See p. 26.) That would leave the SLD $165.098 million short of the $2,250 million it was supposed to commit under the Commission's rules.

[11] At the time when the SLD concluded it did not have enough money to support the HISD application, the SLD was earning more in interest on funds that had been collected and not disbursed than the amount it was incurring in expenses. For instance, USAC, in its report on "Fund Size Projections and Contributions Base for the Fourth Quarter 2000," reported that the cost of running the schools and libraries program for that quarter was expected to be $9.2478 million, compared with the $16.088 million in interest that would be earned from funds that had not been disbursed by the schools and libraries support mechanism. (Federal Universal Service Support Mechanisms, Fourth Quarter 2000, p. 3 and p. 7)

The same pattern was reported in the report for the first quarter of 2001, which USAC released in the same month it decided it could not fund HISD's request. That month it reported that the expenses of the schools and libraries program were projected to be $9.2707 million, and the interest earned on undisbursed funds would be $23.848 million. (USAC, Federal Universal Support Mechanisms, First Quarter, 2001, p. 4 and p. 8.)

Again, in the second quarter of 2001, the pattern was expected to persist: the schools and libraries program would cost $7.6169 million to operate and the program would earn $19.924 million.(USAC, Federal Universal Support Mechanisms, Second Quarter, 2001, p. 3 and p. 8.)

predicting what the SLD will need to cover meritorious appeals remains an imprecise art at best.

For instance, from March 31, 2000 to June 30, 2000, the SLD had approved only $20.4 million in commitments arising from meritorious Year Two appeals.[12] In the next quarter, the quarter that preceded the determination of the Year Three threshold, the SLD had approved only another $15 million in commitments arising from meritorious Year Two appeals.[13] Yet, HISD's appeal alone, if successful, would involve more than $14 million. The point is, when the SLD said that it had no more money available, it did not know for sure how much funding would be required to cover those appeals—and it still does not know.

A successful appeal by a large consortium or large school district could involve millions of dollars, while a request from a small private school might involve a few thousand. Although the SLD should have had by the end of November 2000 a good indication of the total dollar value of Program Year Three appeals that had been submitted on a timely basis, it could not know whether those appeals would receive a favorable review or the total dollar value of possible appeals, if any, from funding commitment decisions still pending. In fact, to our knowledge, the SLD still has not finished its initial review of Program Year Three appeals, and all of the resulting funding commitments, much less appeals, such as this one, that have been pursued to the Commission.

Hence, in order to fulfill the Commission's mandate to make commitments "until there are no remaining funds," the SLD should have deferred a decision on HISD's funding request until it could determine exactly (or at least with reasonable certainty) how much funding it actually would need, not simply to cover all of the appeals that had been filed, but rather the amount necessary to support the truly meritorious ones. Because with each new program year, the applicant community is learning more about

[12]USAC, Federal Universal Service Support Mechanisms Fund Size Projections and Contribution Base for the Fourth Quarter 2000, August 2, 2000, p. 28.
[13]USAC, Federal Universal Service Support Mechanisms, First Quarter 2001, p. 25.

how to complete an application correctly, and the SLD staff is learning more about how to review it correctly, this number could vary dramatically from year to year.

In short, every fact points in the exact same direction -- the whole-number-percentage cutoff point that the SLD selected, 82 percent, could not have been anything but an arbitrary selection. Even if the amounts needed to satisfy appeals were to balloon unexpectedly, the SLD had absolutely no reason even to speculate that no funding would remain after it funded the last Program Year Three request at 82 percent. And, if funding remains at the end of the year, as it surely will, the SLD has no choice under the Commission's rules but to continue to allocate it.

III. Conclusion

Together, all of the foregoing clearly supports one, very simple conclusion: namely, that the SLD knew -- or certainly should have known -- that its decision to cut off internal connections funding at 82 percent for the stated reason that *no funds remained* to support applicants' internal connections requests at the 81 percent level rested on a factual foundation that could not possibly stand. With an approximately $165 million dollar margin for error and substantial revenues coming in from interest (not to mention large amounts of funding anticipated to be "returned" to the universal service fund due to applicants' overestimates and unspent commitments), the SLD had to know that it had, or eventually would have, some funds *remaining* to pro rate or, possibly, even to fund fully all of the requests at 81 percent.

As the Commission's rules require the SLD to fund fully the last full discount percentage it can and to pro rate over a single discount percentage whatever funds remain after that, it is evident under the circumstances that the SLD's decision to cut off funds at 81 percent was improper and, therefore, outside the scope of its authority. Accordingly, the SLD's decision not to fund HISD's request for internal connections support at 81percent must be reversed.

IV. **Relief Sought**

HISD is by any definition well qualified for support under the E-rate program's goals of providing support to the neediest schools and libraries. More than 52 percent of its students are Hispanic and another 34 percent are African-American. About two-thirds of its students are eligible for the National School Lunch Program and about one-quarter are not fluent in English. In fact, if it were not for the high proportion of students whose families do not speak English, families for whom it may be difficult to fill out a federal form, the district would likely be able to count enough additional students to qualify it for that magic 82 percent discount rate for Program Year Three.

HISD requests a determination that the SLD had no authority to adopt a policy to reject, *pro forma,* all applications for internal connections below 82 percent in Program Year Three. It further requests the Commission to direct the SLD to approve its request for $14,855,081.16 in E-rate support contained in FRN 455725. Alternatively, HISD asks the Commission to instruct the SLD to reinstate FRN 455725 and to hold it in abeyance, pending a factually supportable determination by the SLD regarding exactly how much funding remains available to support the request.[14]

[14] USAC may argue that to defer a decision on certain funding requests would create administrative issues for the agency. Nevertheless, the Schools and Libraries Program has a long history of managing deferred funding requests. For instance, as of April 15, 2001—nearly 10 months after the close of the Year Two Program Year--the SLD has still not issued funding commitments for Year Two applications that were filed after the close of the Year Two filing window. Thus applicants have been waiting since at least March 31, 2000 and possibly as long as since April 7, 1999 to find out whether their requests will be funded. Similarly, in the fourth quarter of 2000, the SLD made $71.692 million worth of Program Year One funding commitments, nearly 18 months after the end of Program Year One. (See USAC, Second Quarter, 2001, p. 25 and Appendix SL1.) Furthermore, the SLD even held up ruling on the FRN in issue here for a period of six months, sending a funding letter to HISD stating that the FRN was "as yet unfunded." There is no reason that status could not have been extended indefinitely.

Respectfully submitted on behalf of the
Houston Independent School District,

FUNDS FOR LEARNING, LLC

Date: 4/18/01

By: ______________________
Orin R. Heend

cc : William L. Edwards
Interim Assistant Superintendent,Technology and Information Systems
Houston Independent School District
Hattie Mae White Administration Bldg.
3830 Richmond Avenue
Houston, TX 77027-5864